

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session

Vote No. 149

June 4, 1998, 5:45 p.m.
Page S-5622 Temp. Record

TOBACCO BILL/Increased Look-Back Penalties

SUBJECT: National Tobacco Policy and Youth Smoking Reduction Act . . . S. 1415. Lott motion to table the Daschle (for Durbin/DeWine) perfecting amendment No. 2438 to the Daschle (for Durbin) amendment No. 2437 to the instructions (Gramm amendment No. 2436) to the Gramm motion to recommit the Commerce Committee modified substitute amendment No. 2420.

ACTION: MOTION TO TABLE FAILED, 29-66

SYNOPSIS: The "Commerce-2" committee substitute amendment (see NOTE in vote No. 142) to S. 1415, the National Tobacco Policy and Youth Smoking Reduction Act, will raise up to \$265.0 billion over 10 years and up to \$885.6 billion over 25 years from tobacco company "payments" (assessments) and from "look-back" penalties that will be imposed on tobacco companies if they fail to reduce underage use of tobacco products. Most of the money will come from the required payments (\$755.67 billion over 25 years). Additional sums will be raised from other fines and penalties on tobacco companies, and the required payments will be higher if volume reduction targets on tobacco use are not met. The tobacco companies will be required to pass on the entire cost of the payments to their consumers, who are primarily low-income Americans. By Joint Tax Committee (JTC) estimates, the price of a pack of cigarettes that costs \$1.98 now will rise to \$4.84 by 2007. The amendment will require the "net" amount raised, as estimated by the Treasury Department, to be placed in a new tobacco trust fund. (The net amount will be equal to the total amount collected minus any reductions in other Federal revenue collections that will occur as a result of increasing tobacco prices. For instance, income tax collections will decline because there will be less taxable income in the economy). The JTC estimates that the amendment will raise up to \$232.4 billion over 9 years, but only \$131.8 billion net. Extending the JTC's assumptions through 25 years, a total of \$514.2 billion net will be collected. The amendment will require all of that money to be spent; 56 percent of it will be direct (mandatory) spending. The Federal Government will give States 40 percent of the funds and will spend 60 percent. Medicare will not get any of the funding in the first 10 years unless actual revenues are higher than estimated in this amendment (in contrast, the Senate-passed budget resolution required any Federal share of funds from tobacco legislation

(See other side)

YEAS (29)		NAYS (66)			NOT VOTING (4)	
Republicans (24 or 46%)	Democrats (5 or 12%)	Republicans (28 or 54%)	Democrats (38 or 88%)		Republicans (2)	Democrats (2)
Allard	Breaux	Abraham	Akaka	Kerrey	Hatch- ^{2AY}	Biden- ²
Burns	Bumpers	Ashcroft	Baucus	Kerry	Specter- ³	Inouye- ²
Campbell	Ford	Bennett	Bingaman	Kohl		
Coats	Hollings	Bond	Boxer	Landrieu		
Cochran	Robb	Brownback	Bryan	Lautenberg		
Enzi		Chafee	Byrd	Leahy		
Faircloth		Collins	Cleland	Levin		
Frist		Coverdell	Conrad	Lieberman		
Gorton		Craig	Daschle	Mikulski		
Hagel		D'Amato	Dodd	Moseley-Braun		
Helms		DeWine	Dorgan	Moynihan		
Kyl		Domenici	Durbin	Murray		
Lugar		Gramm	Feingold	Reed		
Mack		Grams	Feinstein	Reid		
McCain		Grassley	Glenn	Rockefeller		
McConnell		Gregg	Graham	Sarbanes		
Nickles		Hutchinson	Harkin	Torricelli		
Roth		Hutchison	Johnson	Wellstone		
Smith, Bob		Inhofe	Kennedy	Wyden		
Stevens		Jeffords				
Thomas		Kempthorne				
Thompson		Murkowski				
Thurmond		Roberts				
Warner		Santorum				
		Sessions				
		Shelby				
		Smith, Gordon				
		Snowe				

VOTING PRESENT (1)
Lott

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

to be used to strengthen Medicare; see vote No. 84).

The Gramm motion to recommit with instructions would direct the Commerce Committee to report the bill back with the inclusion of the amendments already agreed to and the Gramm amendment No. 2437. The Gramm amendment would adopt the Gregg/Leahy amendment (see NOTE below) and would eliminate the marriage penalty in the tax code on couples earning less than \$50,000 per year. (Under current law, all married people are taxed at a higher rate than they would be if they were single and their income were divided between them). The Gramm amendment would increase the deduction for married couples earning less than \$50,000 so as to eliminate the penalty, and would amend the Earned Income Credit (EIC) to ensure that increasing the deduction would not decrease eligibility for the EIC. The tax relief for low income families that would be provided by this amendment in the first 5 years would be approximately equal to one-third of the revenues raised by the bill.

The Durbin amendment to the instructions to the Gramm motion would strike the proposed marriage penalty tax relief, and would increase the “look-back” penalties. The “look-back” penalties would assess fines on the tobacco companies if they failed to meet prescribed youth smoking reduction targets. The tobacco settlement agreement negotiated between tobacco companies and the States’ contingency-fee trial lawyers set yearly percentage reduction targets for youth smoking, and provided that the tobacco companies would pay \$80 million for each percentage point in a year that they had missed a target, up to a maximum of \$2 billion annually. The Commerce Committee substitute, as originally reported, increased the penalty rates for higher non-attainment percentages (the highest rate would be \$240 million for each percentage point) and increased the maximum yearly penalties to \$3.85 billion. The penalty would be assessed based on each manufacturer’s share of the market, as measured by Federal tobacco excise tax payments. Smoking rates would be determined by using the University of Michigan Survey that determines the percentage of teens who daily use tobacco, or by using a comparable index using identical methodology. As modified in the Commerce-2 substitute, those penalties were increased to \$4.4 billion, indexed for inflation. Additionally, each manufacturer that failed to meet a reduction target on one or more of its brands would be fined \$1,000 per underage user over the percentage reduction target. Instead of conducting a survey using the University of Michigan methodology, the Secretary of Health and Human Services would be required each year to conduct two polls of young individuals--the first poll would ask them if they had used a tobacco product within the last 30 days, and the second poll would ask them to identify which brands of tobacco products they had used. Those polls would be used to estimate the percentage reductions in underage use of tobacco products, and to estimate the underage use of particular brands. The results would be “deemed conclusively to be proper, correct, and accurate.” The Durbin amendment would retain the polling provisions, increase the required percentage reduction in cigarette use by year 10 to 67 percent (the Commerce-2 amendment would require a 60 percent reduction by year 10), would decrease the industry-wide cap to \$2.2 billion, indexed for inflation, and would impose new brand-specific penalties, indexed for inflation, that would be capped at \$5.5 billion, indexed for inflation, for total look-back penalties of \$7.7 billion. (In contrast, the \$1,000-per-underage-user penalty in the Commerce-2 amendment would raise \$1.5 billion if every manufacturer failed to reach the target by 24 percent, which is the level at which the Durbin amendment would cap payments at \$5.5 billion. Total look-back penalties in the Commerce-2 amendment at the Durbin amendment’s capped level of \$7.7 billion would be \$5.9 billion).

The Durbin/DeWine perfecting amendment to the Durbin amendment would strike the Durbin amendment look-back provisions and would substitute identical provisions. (Adding the Durbin/DeWine amendment filled a parliamentary opening for offering an amendment that could have been used by Senators to reoffer and obtain a vote on the Gramm amendment language).

During debate, Senator Lott moved to table the Durbin second-degree amendment. The motion to table is not debatable; however, some debate preceded the making of the motion. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

NOTE: After the vote, the amendment was adopted by voice vote, and Senator Lott offered the Coverdell/Craig amendment regarding illegal drug use (see vote No.151) .

Two Gregg/Leahy amendments were pending at the time of the vote (see vote No. 145).

Those favoring the motion to table contended:

The Durbin/DeWine amendment ups the ante yet again. The look-back provisions which were agreed to between tobacco companies and trial lawyers last year were a bad idea to begin with, and they have been getting worse with every proposal. In the tobacco agreement, trial lawyers negotiated a deal with the tobacco companies that included that the companies would voluntarily agree to penalties if they did not meet youth smoking reduction targets. They agreed that as an industry they would pay \$80 million for each percentage point by which youth smoking did not decline, up to a maximum of \$2.2 billion per year. The tobacco industry made that agreement in return for the promise of extensive liability protections. Numerous parts of the agreement required congressional action. In effect, the tobacco industry and trial lawyers tried to dictate the contents of legislation to be enacted by Congress. They overstepped their bounds if they thought Congress should rubberstamp their agreement. Members determine the contents of legislation, not trial lawyers and tobacco companies. From the beginning, we thought that the look-back provisions were just a hidden tax that would be subject to political manipulation, and that the honest way to approach this subject would be to drop

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the payments and look-back provisions and just increase the excise tax. The tobacco industry has now walked away from the agreement, and said it is not willing to reconsider, so any look-back provisions are now not only unwise, but unconstitutional. Tobacco companies do not break any laws if teenagers choose to smoke--in many States, the teenagers themselves are not breaking any laws. Generally, they are only blocked from buying cigarettes, and when they illegally buy them they are not buying them from the manufacturers. Usually, they are getting them from friends. It is not constitutional to punish one person for another's actions. After the tobacco companies walked away from the agreement, the logical course of action would have been to strike the look-back provisions, and the payment provisions, and just impose an excise tax, which is clearly constitutional. Doing so, though, would just expose what a giant tax-and-spend bill this is.

Instead, our colleagues just made the provision worse. In the first iteration of the Commerce substitute, the penalties were increased to nearly \$4 billion. In the second iteration, which was drafted by the Clinton Administration the day before the bill was shoved onto the Senate floor, they were increased to \$4.4 billion, and a company-specific fine for each brand was added. That fine would penalize a company \$1,000 for each underage tobacco user for a brand that did not meet the reduction target. Just as offensively, it changed the way that the Government would decide if a target had been met--instead of using the methodology used in the University of Michigan Survey, which measured the percentage of daily tobacco use by teens, the Secretary of Health and Human Services would conduct two polls each year. In one poll, teens would be asked if they had smoked within the past 30 days. In the second poll, they would be asked what brands they had smoked. These polls would then be used to determine smoking rates, which would be "deemed" accurate. The opportunity for political abuse with this arrangement would be immense. For instance, the Secretary could conduct the poll right after the Fourth of July weekend, because many kids on vacation who rarely smoke may casually smoke one or two cigarettes at that time. Further, the idea that we should "deem" a poll to be accurate should be absurd on its face to every Senator. In every election, competing candidates waive about their polls showing how they are winning, and the margins of those polls vary widely. Nonpartisan polls vary just as widely, and even in cases when pollsters are in close agreement the elections often prove that they were wildly inaccurate. In this case, the proposal in the Commerce-2 bill is to give a political appointee broad authority to design a poll of kids to determine how many billions of dollars in penalties to impose on tobacco companies.

Our colleagues apparently did not think that this proposal was quite bad enough, because they have now offered an amendment to raise the targets and increase the penalties. They have also shifted the burden from being on the industry as a whole to being targeted at particular manufacturers, which would be fairer if a particular company were guilty of egregious conduct, but which would also increase the concerns on constitutionality because it would be more specific. As we have already stated, though, our colleagues' claim that tobacco companies are responsible for teen smoking is unfounded. Their own statistics refute their arguments. As evidence, they have cited quotes from tobacco company officials that show that they want to increase teen smoking, and have said that the increase in teen smoking must therefore be due to a clever advertising campaign aimed at youth. We have no doubt that the cigarette manufacturers would like to induce children to smoke. However, malevolent intent does not translate into results. Our colleagues' quotes show that those manufacturers had that malevolent intent for decades. How then do our colleagues explain that teen smoking dropped dramatically during the 1980s? Are we to assume that the tobacco companies were evil and stupid during the Reagan and Bush presidencies, and evil and clever during the Clinton presidency? Drug use also plummeted through the 1980s, and took off as soon as President Clinton was elected. Did drug dealers have qualms about marketing to children in the 1980s? The tobacco companies have lied under oath, they have tried to make their cigarettes more addictive, and they have marketed to children, but that does not mean that they control teens' behavior. We will not join our colleagues in their bidding war to make the unconstitutional, unworkable, politically manipulatable look-back provisions even worse. We support the motion to table this amendment.

Those opposing the motion to table contended:

We are generally supportive of this bill, and we complement the Chairman of the Commerce Committee for the work he has done on this very controversial subject. It was a herculean task to even get a bill to the floor. Our job now is to improve it. One of the major areas in need of improvement is the look-back section. The pending Durbin/DeWine amendment would make two changes to the provisions of that section, one of which would be technical and one of which would be substantive. The technical change would be to increase the 10-year reduction target to 67 percent. That increase should be made because a year has passed since the agreement was reached, and during that year the teen smoking rate has increased. Therefore, to get the number, rather than percent, of teens down to the level agreed to by the tobacco companies, smoking rates would now have to be cut by 67 percent instead of 60 percent. The substantive change that would be made by the amendment would be to make the penalties more company-specific. Under the Commerce-2 bill, some company-specific penalties would be imposed when particular brands did not have reductions in teen use, but they would not be great enough to dissuade bad actors. In particular, we do not think that they would serve as an effective deterrent to the Phillip Morris company, which manufactures Marlboro cigarettes. In 1993, 60 percent of teens who smoked smoked Marlboros. Under the Commerce-2 substitute, if it failed to reduce that level of smoking, all companies would be punished,

and its share of the punishment would be 23 percent. Thus, without any company-specific penalties, it would actually have an incentive not to reduce teen smoking, because it would get the benefit of the new customers and its competitors would have to pay most of the penalties. It is true that the substitute now has some penalties based on particular brands, but even if every brand missed its target by as much as 24 percent the penalties would still only come to about a third of the industry-wide penalties. To correct this problem, the Durbin/DeWine amendment would cap the industry-wide payments at \$2.2 billion per year, indexed for inflation, and would greatly increase the company-specific penalties and cap them at \$5.5 billion per year. Our colleagues view this change as an increase in the total maximum penalties. It could be, assuming that it would be impossible for particular companies to miss their targets by huge percentages. However, in an extreme case, a particular company under their amendment could be much more than 24 percent of the market. If Marlboro use by teens were to grow by 20 percent instead of decline by the required 67 percent, for instance, it would be hit with a several-billion-dollar penalty. We believe that the potential maximum surcharges of \$7.7 billion in this amendment are roughly the same as in the underlying amendment. The main difference is that the guilty companies under this amendment would pay almost all of the fines. That is the fair way to proceed. We therefore urge our colleagues not to table this amendment.